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Southern District of New York*

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March 28, 2017

BY ECF

The Honorable Valerie E. Caproni
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. Joseph Percoco, et al., 16 Cr. 776 (VEC)*

Dear Judge Caproni:

The Government respectfully writes in response to the letter from defendants Peter Galbraith Kelly, Jr. and Joseph Percoco, dated March 27, 2017 (the "March 27 Letter"), responding to the Government's March 24, 2017 discovery status letter (the "March 24 Letter").

In their March 27 Letter, Kelly and Percoco raise two issues. First, they address certain documents provided to the Government by the Energy Company, for which Kelly's counsel recently requested re-production in a format distinct from the format in which the Government received and reviewed the documents. Second, they seek a response to their respective bill of particulars requests at least 48 hours in advance of the April 6, 2017 pretrial conference, claiming the Government's response is necessary for them to determine the substance and timing of their pretrial motions.

The Energy Company Documents

As noted in the Government's March 24 Letter, during the course of the Government's investigation in this case, the Energy Company produced documents (the "Energy Company Documents") to the Government in .pdf format, and the Government reviewed them in that format. Between December 2016 and February 2017, the Government produced the Energy Company Documents to the defendants. Prior to production, the Government processed the Energy Company Documents to make them word-searchable, but additional metadata was not available due to the .pdf format in which the Government received the documents.

Approximately two weeks ago, in response to Kelly's request, the Government asked the Energy Company to re-produce the Energy Company Documents with any additional metadata they possessed. As the Government advised defense counsel on March 27, 2017, the Energy Company expects to provide the re-production to the Government by April 5, 2017. Upon receipt, the Government will make the re-production available to the defendants.

Kelly claims that, without the re-production, he is “unable to sort...in any meaningful way” emails “between Mr. Kelly, Mr. Percoco, and the Government’s cooperating witness, Todd Howe.” This claim is dubious. In fact, more than six months ago, Kelly’s counsel obtained -- directly from the Energy Company -- a .pst file containing Kelly’s company emails, including his emails with Percoco and Howe, with all of the relevant metadata corresponding to those emails. The Government understands that at least 13,700 of the emails the Government obtained and produced in .pdf format were previously produced in the .pst file to Kelly’s counsel. Accordingly, with regard to emails between Kelly, Percoco and Howe produced by the Energy Company, Kelly’s counsel currently has, and has had for some time, more metadata than the Government. In any event, all counsel will have the re-produced set within the next week.

The Bill of Particulars Requests

As the Government advised the Court and the defendants, we intend to respond to Kelly and Percoco’s bill of particulars requests, sent to the Government on February 28 and March 7, 2017, by April 10, 2017. Kelly and Percoco assert that a response is necessary in advance of the next pretrial conference in order for them to be able to discuss a motion schedule at that conference. The Government’s response to the bill of particulars requests should not materially affect the substance or timing of motions. As an initial matter, while the Government continues to analyze the defendants’ requests, it appears that many are premature, as they seek a detailed preview of the Government’s case and its legal theories, to which the defendants are not entitled at this time. In addition, to the extent other defendants intend to seek a bill of particulars, the Government believes it would be most efficient to evaluate as many of those requests as possible in conjunction with one another, and to respond collectively. Finally, the Government expects the defendants will collectively seek a motion schedule such that they will have more than enough time to prepare any motion for a bill of particulars in addition to other motions they are considering.

Respectfully submitted,

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cc: Counsel for all defendants (via ECF)